



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Edward F. Carey - Pay Retention - Foreign
Service Appointment
File: B-229104
Date: April 4, 1988

DIGEST

An employee who held a 30-month Foreign Service term appointment with the Peace Corps was not entitled to retained pay when he exercised his statutory reemployment rights and was reemployed at ACTION at a lower rate of pay. The employee's statutory rights define the extent of his agency's obligation to reemploy him in his former position, and there is no authority in the grade and pay retention statute, 5 U.S.C. §§ 5361 et seq., to expand upon this authority. Further, Office of Personnel Management regulations specifically preclude an employee serving under a temporary reassignment from retaining a grade or rate of basic pay held during a temporary reassignment.

DECISION

Mr. Edward F. Carey, an employee of ACTION, has appealed our Claims Group Settlement Z-2864133, August 3, 1987, which denied his claim for retained pay when he transferred from the Peace Corps to ACTION. For the reasons that follow, we affirm our Claims Group determination.

BACKGROUND

Sections 4 and 5 of the 1965 amendments to the Peace Corps Act (now codified at 22 U.S.C. § 2506 (1982)), Public Law 89-134, August 24, 1965, 79 Stat. 549-551, rescinded the prior authority of the President under the Peace Corps Act to appoint Peace Corps employees serving in the United States in accordance with the standard civil service laws and regulations. The 1965 amendments provided that Peace Corps appointment authority is solely under the Foreign Service Act, as amended, 22 U.S.C. §§ 3901 et seq. (1982), relating to the appointment of Foreign Service Staff officers and employees. See B-198187, Apr. 22, 1980.

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Executive Order 12137, May 16, 1979, established the Peace Corps as an autonomous agency within ACTION, and provided for the transfer of certain ACTION functions and employees with competitive service to the Peace Corps. Mr. Carey was one of the ACTION employees slated for transfer.

Mr. Carey was employed by ACTION as a Supervisory Employee Development Specialist, grade GS-13, step 8, with an annual salary of \$36,228. He was offered the opportunity to transfer to the Peace Corps at his same position and retain his competitive status. Mr. Carey declined the offer to transfer with competitive status, and he was then offered a Foreign Service appointment for 30 months with the Peace Corps as an FR-4, step 7, with a retained rate of pay of \$36,228 and with statutory reemployment rights back to ACTION. Mr. Carey accepted this offer and transferred to the Peace Corps on May 3, 1980. At the end of his term appointment, October 31, 1982, Mr. Carey exercised his reemployment rights and returned to ACTION as a Management Analyst, grade GS-13, step 10, with an annual salary of \$45,406. Mr. Carey's salary at the time of this transfer from the Peace Corps back to ACTION was \$49,837.

Mr. Carey contends that he was given retained pay under the provisions of 5 U.S.C. § 5363 (Supp. III 1979) when he transferred from ACTION to the Peace Corps in 1980, and that he should have been granted retained pay in 1982 when he returned to ACTION. Mr. Carey also alleges that another ACTION employee under similar circumstances did not lose any salary when he exercised his reemployment rights and returned to ACTION.

Both ACTION and our Claims Group denied Mr. Carey's claim on the basis that his only rights were to reemployment as prescribed under the provisions of 5 U.S.C. § 3597 (1982). That section provides for reemployment in a former position or a corresponding or higher position following a limited appointment in the Foreign Service at the rate of pay, including within-grade increases, that the employee would have received if the employee had remained in the former position.

OPINION

It is true, as Mr. Carey states, that the Form 50, Personnel Action, prepared by the Peace Corps, provided for a retained rate of pay on the basis that his 1980 transfer to the Peace Corps constituted a loss in status and a loss in pay. We believe that the Peace Corps' determination that Mr. Carey was entitled to retained pay at that time was in error. Members of the Foreign Service whose pay is fixed under the Foreign Service Act of 1980 are specifically excluded from the provisions pertaining to grade and pay retention unless they are subject to reduction-in-force procedures. See 5 U.S.C. § 5102(c)(2) (1982); 22 U.S.C. § 3964(b)(2) (1982). Although Mr. Carey was not entitled to retained pay as a matter of law, the Secretary of State is given discretion to place an employee in a higher salary class upon appointment under certain circumstances. 22 U.S.C. §§ 3947, 3964 (1982). See also Foreign Affairs Manual, tit. 3, § 221.3-3. This authority is similar to the "highest previous rate" rule in 5 U.S.C. § 5334(a) (1982), which allows heads of agencies in their discretion and pursuant to Office of Personnel Management (OPM) regulations to appoint individuals above the minimum rate of their grade. Since there was authority to appoint Mr. Carey in the Peace Corps at his highest previous rate, we will not now question the Peace Corps' 1980 classification of Mr. Carey's appointment on his Form 50 as being at a retained rate of pay.

As previously stated, Mr. Carey was granted a statutory right to reemployment at ACTION after his limited appointment in the Foreign Service. 5 U.S.C. § 3597, supra. See also 22 U.S.C. § 3950 (1982). These statutory rights define the extent of his agency's obligation to reemploy him in his former position or a corresponding or higher position together with any in-grade increases he would have received if he had remained in his former position. There is no authority in the grade and pay retention statute, 5 U.S.C. § 5361-63, to expand upon this authority. Richard J. Magner, 59 Comp. Gen. 311 (1980). In addition, OPM regulations specifically preclude an employee who is serving under a temporary reassignment from retaining a grade or rate of basic pay held during a temporary reassignment.

5 C.F.R. § 536.105(b) (1982). Since Mr. Carey's initial appointment was for a 30-month term, he served under a temporary reassignment and would not be eligible for a retained rate of pay. John C. Ramos, B-220829, Sept. 26, 1986.

We also note that ACTION apparently exercised its discretionary authority under 5 U.S.C. § 5334(a) and granted Mr. Carey his highest previous rate based on his Peace Corps salary when it placed him in a GS-13, step 10 position. Since there is a maximum waiting period of 156 calendar weeks in steps 8 and 9, 5 U.S.C. § 5335(3) (1982), it seems unlikely that Mr. Carey would have attained eligibility to a step 10 in a 2-year period, and the maximum he apparently would have been entitled to under 5 U.S.C. § 3597 would have been step 9. However, the highest previous rate rule has never been construed as excluding salary rates attained in the Foreign Service so as to prevent an agency from exercising its discretionary authority to grant an employee a higher step upon reemployment than prescribed by a statute granting an employee reemployment rights. 51 Comp. Gen. 50 (1971). Therefore, the agency's action in placing Mr. Carey at step 10 upon his reemployment from a Foreign Service position was proper.

As to Mr. Carey's allegations that another ACTION employee in similar circumstances was granted retained pay, we are unable to resolve this matter since it has not been presented to us. However, if the employee was in a lower step in his grade when he transferred to the Peace Corps, it is conceivable that he could have returned to ACTION without any loss in pay if the agency exercised its discretionary authority under the highest previous rate rule and placed him in a similar higher step upon his return.

Accordingly, Mr. Carey's claim for retained pay is denied and our Claims Group's settlement of August 3, 1987, is hereby sustained.



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